88-1309

No. 88-_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THE STATE OF MINNESOTA; RUDY PERPICH, as Governor of the State of Minnesota; HUBERT H. HUMPHREY, III, as Attorney General of the State of Minnesota,

Cross-Petitioners,

v.

JANE HODGSON, M.D.; ARTHUR HOROWITZ, M.D.; NADINE T., JANET T., ELLEN Z., HEATHER P., MARY J., SHARON L., KATHY M., and JUDY M., individually and on behalf of all other persons similarly situated; DIANE P., SARAH L., and JACKIE H.; MEADOWBROOK WOMEN'S CLINIC, P.A.; PLANNED PARENTHOOD OF MINNESOTA, a nonprofit Minnesota corporation; MIDWEST HEALTH CENTER FOR WOMEN, P.A., a nonprofit Minnesota corporation; WOMEN'S HEALTH CENTER OF DULUTH, P.A., a nonprofit Minnesota corporation,

Respondents.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

Cross-petitioners have opposed the petition for certiorari to the Eighth Circuit in *Hodgson, et al. v. State of Minnesota, et al.*, S. Ct. No. 88-1125. If certiorari is granted in that case, cross-petitioners seek review of the following question:

May a state constitutionally require a physician to attempt with reasonable diligence to notify the parents of an unemancipated minor under the age of 18 at least 48 hours before performing an abortion upon their daughter?

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OPINION BELOW

The opinions below are set forth at pp. 10a-52a of the Appendix to the Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit in *Hodgson,*

et al. v. State of Minnesota, et al., S. Ct. No. 88-1125. (Hereinafter the petition documents in that case are referred to as "Hodgson Petition" and "Hodgson Appendix.")

The opinion of the district court is reported at 648 F. Supp. 756 (D. Minn. 1986).

The en banc opinion of the Eighth Circuit Court of Appeals is reported at 853 F.2d 1452 (8th Cir. 1988).

JURISDICTION

Jurisdiction has been asserted in *Hodgson, et al. v. State of Minnesota, et al.*, S. Ct. No. 88-1125, pursuant to 28 U.S.C. § 1254(1). Jurisdiction over this cross-petition is also proper pursuant to that section.

Cross-petitioners received copies of the Petition for Certiorari in *Hodgson v. State* on January 6, 1989. Pursuant to Rule 19.5 of this Court a cross-petition may be filed within 30 days after receipt of a petition for certiorari.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Minnesota Statutes § 144.343, subds. 2-5, the statute at issue in this case, is reprinted in full in the Hodgson Appendix. (1a-4a). These subdivisions require, with certain important exceptions, that a physician attempt with reasonable diligence to notify the parents of an unemancipated minor child at least 48 hours before performing an abortion upon the child.

STATEMENT OF THE CASE

I. History of the Litigation.

The chronological history of this litigation is contained on pages 3-6 of the Hodgson Petition. As respects the parental notice requirement both the district court (Hodgson Appendix 38a) and the court of appeals (Hodgson Appendix 81a) concluded rather summarily that prior decisions of this Court hold that a judicial bypass procedure is constitutionally required as an alternative to a parental notification law.

II. Facts.

A. The Parental Notification Requirement Generally.

The statutory requirement of parental notification contained in Minn. Stat. § 144.343, subd. 2, was intended to serve the state's substantial and legitimate interest in the family-based child-rearing process and in protecting the well-being of minors in connection with the consequences of a decision to have an abortion by enabling parents to offer support and guidance in helping their daughter to make an informed decision regarding her unintended pregnancy without imposing a parental veto on that decision. Defendants' Exhibits (hereinafter D. Exh.) 70-72.

Plaintiffs[1] at trial brought on numerous lay and expert witnesses in support of their challenge to the parental notification requirement. The testimony critical of the parental

[1] The parties will be referred to with reference to their posture at trial. Cross-petitioners will be referred to as "defendants" and the respondents as "plaintiffs."

notification requirement falls into two broad categories: (1) testimony concerning various burdens allegedly imposed upon pregnant minors by the parental notification requirement, and (2) testimony questioning both the necessity and the effectiveness of the parental notification requirement in actually furthering the statutory purpose of promoting the well-being of minors confronted with an unintended pregnancy and the decision of whether or not to terminate that pregnancy.

B. The Alleged Burden of Parental Notification.

Much of plaintiffs' evidence concerning the alleged burdens of the parental notification requirement relates to the incidence and prevalence of "dysfunctional" families and intrafamilial violence in the United States generally. According to one of plaintiffs' experts, a "normal" family is one in which there is functioning communication and a reasonable amount of trust. T. 983.[2] By contrast, a "dysfunctional family," as defined by plaintiffs' experts, does not cope effectively with daily stresses and woes of its members and communication is impaired. A. 461,[3] T. 904-05, 984-85. Members of a dysfunctional family may engage in family violence, and studies indicate that violence occurs in two million families in the United States. A. 457-61, T. 333-34, 984-85. There are some minors in Minnesota who fear violence from family members. A. 297, A. 382, A. 486. In addition, it appears that a very small minority of pregnant minors in Minnesota wish to

[2] Page references herein preceded by "T." are to portions of the trial transcript which were not contained in the Appendix on appeal to the Eighth Circuit.

[3] Page references herein preceded by "A." are to the Appendix filed in the Appeal to the Eighth Circuit.

avoid telling one or both of their parents about their intended abortion because of fear of physical abuse.[4]

The State's witnesses did not dispute that there exist dysfunctional families in which there is violence or abuse or that there are minors in Minnesota who are victims of violence or who fear violence. Nevertheless, although parents of several thousand minors were notified of their daughters' decision to have an abortion pursuant to the statutory requirement from August 1, 1981, to March 1, 1986,[5] the record fails to reveal a single instance in which any such minor has suffered any violence as a consequence of the notification.

A small minority of Minnesota minors have sought to avoid notifying their parents of the abortion on the basis of an apprehension that their parents would somehow prevent the abortion from occurring.[6] Once again, however, of the several thousand pregnant minors who have notified both parents

[4] Of 258 minors appearing before Ramsey County Judge Peterson in judicial bypass hearings in the period from August 1, 1981, through November 30, 1982, four percent indicated that they did not wish to notify their parents about their abortion because of fear that prior physical abuse would reoccur. Plaintiffs' Exhibit (P. Exh.) 21.

[5] During this period 3,573 bypass petitions were filed in Minnesota courts. Hodgson Appendix 23a. Both Dr. Hodgson (Hodgson Depos. at 122, see footnote 7 *infra*) and Paula Wendt (A. 312) testified that only about one-half of their minor patients choose the court bypass option. The actual figures offered by Wendt disclose, in fact, that only 40 percent of Meadowbrook minors have actually chosen the court option. A. 312. Since very few minors have been excused under the emancipation or abuse/neglect exceptions, it is reasonable to conclude that the number of minors who have notified their parents is at least equal to the number that sought court dispensation. *See also* Opinion of the Circuit court. Hodgson Appendix at 83a n.9.

[6] Of the 258 minors appearing before Juvenile Court Judge Peterson in judicial bypass proceedings for the period August 1, 1981, to November 30, 1982, five percent expressed such a fear. P. Exh. 21.

pursuant to the statutory requirements since August 1, 1981, the record fails to reveal a single instance of parental prevention of an abortion.

Plaintiffs also presented evidence of the claims of various minors made to counselors, health care providers and judges that notification to their parents would result in various other consequences perceived by the minor as unpleasant. The reasons claimed by minors for not wishing to make their parents aware of their pregnancy and abortion decision are numerous and include fear of disapproval and hostility, punishment, interference with her relationship with her boyfriend, upsetting a seriously ill parent and generally damaging the parent-child relationship. *See, e.g.*, A. 292-93; Hodgson Depo. of July 11, 1985, at 122;[7] P. Exh. 21.

It appears, however, that a common, if not the most common, reason for the minor's desire to avoid parental notification is a general fear of damaging her relationship with her parents. P. Exh. 21. This is so even in good, functional families. As plaintiff Meadowbrook's co-director Paula Wendt testified based upon her substantial experience in counseling abortion patients, minors seeking to avoid parental notification commonly explain that desire on the basis of "not want[ing] to ruin a good relationship." A. 293. Similarly, Dr. Hodgson herself testified that minors commonly seek to avoid parental notification as "a matter of love for their parents and they don't want to spoil the relationship that they have with their parents." Hodgson Depo. of July 11, 1985 at 122. Moreover, as testified by a number of witnesses, including Dr. Hodgson, adolescents often misapprehend their parents' likely actions in response to their decision to obtain an abortion. A.

[7] The testimony of Dr. Hodgson is found in the transcript of her deposition given for purposes of trial on July 11 and July 12, 1985, and appears in the record as P. Exh. 92.

228, A. 786-87, A. 878, A. 996-97. Dr. Hodgson likewise agreed with defendants' experts that notwithstanding the apprehensions of pregnant minors, parents are generally supportive in helping a minor deal with an unintended pregnancy. A. 229, A. 851-53, A. 866, A. 877.

C. The Need for and Effectiveness of Parental Notification.

In addition to plaintiffs' evidence concerning the alleged burdens involved in the parental notification requirement, a number of plaintiffs' expert witnesses also presented theories challenging the need for and the effectiveness of the statutory notification requirement in promoting the state's goals of protecting the well-being of minors in connection with the consequences of a decision to have an abortion.

With respect to the necessity of parental notification, plaintiffs' several psychological experts testified that in their view the maximum level of intellectual ability is reached by age 14 and that by all available measures of competency, minors are indistinguishable from adults in their capacity to make personal decisions. A. 601-04, A. 607-08, A. 611, A. 692-93, A. 851-53, A. 866-67, A. 877-78. More particularly, the plaintiffs' psychological experts testified that, in their opinion, minors are as competent as adults to make reproductive decisions, including whether or not to terminate a pregnancy and that there is no empirical basis for distinguishing between competency to choose to abort and competency to choose to carry to term or to obtain prenatal medical care. A. 617, A. 635, A. 675a, T. 900, 1135, 1143-44. These same psychological experts, however, also testified that "capacity" to give informed consent to a particular medical procedure is unrelated to maturity, quantity of life experience, overall reasoning ability or even mental health. A. 612-13, T. 887, 959-60.

With respect to the effectiveness of a parental notification requirement, a number of plaintiffs' psychological and health care witnesses questioned the proposition that a parental notification requirement would promote family communication or aid minors in their abortion decision-making. For example, plaintiffs' psychological expert, Dr. Melton, observed that laws mandating parental notice "are not necessarily going to result in [a minor's] more reasoned decision-making." A. 633. Another of plaintiffs' experts in the field of communication patterns with violent families similarly testified that there is no clinical or research data which suggests that forced parental notification in abusive, dysfunctional families would have a positive effect on family communication. A. 473. *See also* A. 230, T. 930, 919, 1395.

However, as a number of plaintiffs' experts themselves recognize, an unplanned pregnancy is an extremely traumatic event for a minor and subjects her to extreme psychological stress. A. 225, A. 337, A. 689-90. In this regard, plaintiffs' experts appear to agree in substantial measure with the testimony of defendants' expert Dr. Vincent Rue. Based upon his clinical experience in providing therapy to pregnant minors, Dr. Rue testified that such minors are psychologically vulnerable when dealing with an unintended pregnancy. Dr. Rue further testified that such vulnerability can result in irrational and emotional decision-making. A. 879-80. For those minors who choose abortion, distinct medical and psychological risks are posed.

Although abortion is a relatively safe medical procedure, there is at least a remote risk of death. A. 120, A. 845. In addition, the risks of abortion include hemorrhage, infection, perforation of the uterus, cervical damage and possible future infertility. A. 845-46. As Dr. Hodgson has herself recognized, adolescents tend to have higher infection rates

after abortion than adults because they tend to delay post-abortion care and ignore complications. A. 170-71. It has also been the experience of the plaintiff abortion clinics that some minors are unable to take responsibility for their post-abortion care without adult supervision, and many do not return to the clinic for after-care. A. 288-89, A. 355, A. 516. Parental notification can thus, in many cases, serve the important function of assisting in the prompt recognition of post-abortion complications and in providing adult supervision for proper post-abortion care. In addition, parents may in some cases be aware of aspects of a minor's medical history of which the minor herself is not aware. A. 848.

A minor who chooses to resolve an unwanted pregnancy through abortion is also at psychological risk. As plaintiff Meadowbrook's co-director Paula Wendt testified based upon her substantial experience in counseling abortion patients, it is not uncommon for young women to feel depressed after an abortion, and for some this feeling of depression is not a trivial phenomenon. A. 353-54, P. Exh. 69. The adverse psychological consequences of abortion may also include guilt, hostility, sadness, remorse, insomnia, eating disorders, relationship difficulties, anniversary reactions and even suicide attempts. A. 881. These adverse consequences, although not common in their more severe form, are well documented in the professional literature. A. 882, D. Exh. 68.[8] Dr. Steven

[8] Dr. David, one of the plaintiff's several expert witnesses, testified that women age 16 and under are very likely to find abortion more stressful than older women and that even 17-year-old women may also encounter greater stress than older women depending on the individual and her family situation. T. 2584-85. Dr. David also pointed out that adolescents in the United States are more at risk for adverse psychological sequelae than adolescents in some other countries, e.g., Denmark, where abortion is less controversial or likely to engender feelings of guilt. A. 924.

Butzer, one of plaintiffs' psychiatric experts, testified that he has provided psychiatric therapy to a number of adolescent patients for post-abortion mental health problems. A. 689-91.

Because of the danger of such adverse psychological sequelae, parental involvement and consultation may serve to support the psychological well-being of the pregnant minor, whether or not she chooses to abort. Indeed, the lack of parental involvement in the minor's abortion decision may itself exacerbate the problem by insulating and isolating the minor and creating considerable guilt, depression, remorse and sadness; both immediately and in the future. A. 868-76.

Moreover, adolescents often misapprehend their parents' reaction to their decision to obtain an abortion, and parental guidance in dealing with an unintended pregnancy can be helpful to the minor even though she may not initially seek out such guidance. A. 226-29, A. 692-93, A. 878, A. 996-97.

Although abortion providers generally counsel their patients concerning options in resolving an unintended pregnancy, there is no assurance that such counseling will be performed by trained and experienced persons. For example, two teen advocates of the Midwest Health Center for Women have performed abortion counseling when only 17 years old and while relatively untrained and inexperienced. A. 526, T. 712, 733 and 738.

In light of the totality of evidence concerning the need for or the utility of a parental notification requirement, the district court specifically found that:

> Parents can provide emotional support and guidance and thus forestall irrational and emotional decision-making. Parents can also provide information concerning the minor's medical history of which the minor may not be aware. Parents can also supervise post-abortion care. In addition, parents can support the minor's psychological well-being and thus mitigate adverse psychological sequelae that may attend the abortion procedure.

District court finding 58, Hodgson Appendix 24a-25a.

D. The Requirement That Both Parents Be Notified.

Plaintiffs' evidence also criticized the parental notification law to the extent that it requires that *both* parents be notified. Plaintiffs' evidence in this regard falls into three categories: (1) evidence concerning the prevalence of divorce in the United States and in Minnesota (A. 315, T. 996-97); (2) opinion testimony that in "dysfunctional" families, involvement of the second biological parent can produce unwanted or disappointing consequences to the custodial parent and the minor (A. 318-21, A. 324-25, A. 392-94, T. 911-13); and (3) opinion testimony that where a minor has already voluntarily notified a single parent, notification of the second parent serves little purpose. T. 927-28, 995-96.

Defendants' expert Dr. Rue testified as to his clinical experience in providing psychotherapy to minors confronted with problem pregnancies. Dr. Rue has encouraged his pregnant minor patients to involve the non-custodial parent and when such advice has been followed, he has observed a subsequent improvement in the relationship between the child and the non-custodial parent. T. 2414-15.

E. The 48-Hour Length of the Parental Notification Requirement.

Plaintiffs also challenge the 48-hour length of the parental notification requirement. Plaintiffs' evidence pertinent to this particular challenge consists of evidence relating to medical

risks associated with the postponement of an abortion procedure.

Minors who elect to notify one or both parents by written notice must wait until 48 hours after actual or consecutive delivery of written notice. Constructive delivery of mail notice occurs at noon on the regular mail delivery date following mailing. Thus the effective length of the statutory parental notice requirement may in many instances be 72 hours.

It is undisputed that, all other things being equal, it is medically preferable to have an abortion at an earlier gestational age than at a later gestational age and that a second trimester abortion is statistically somewhat more risky and is in fact more expensive than a first trimester procedure. There is no evidence in the record, however, that a delay of 48 or 72 hours is medically significant. Plaintiff Meadowbrook's co-director Paula Wendt and Dr. Horowitz, an experienced abortion practitioner and co-owner of Meadowbrook, each testified that there is no significant increased risk of medical complication from week to week within the first trimester and that delays of up to one and one-half weeks within the first trimester do not generally increase the risk of medical complication. A. 347, A. 352, A. 898-99, A. 900-01. Presumably based upon such testimony, the district court specifically found that although delay of any length in performing an abortion increases the statistical risk of mortality and morbidity, "[t]he increase in risk becomes statistically significant when the length of delay reaches one week." District court finding 53, Hodgson Appendix 23a.

With respect to the actual operation of the 48-hour waiting period, the district court found that:

> This statutorily imposed delay frequently is compounded by scheduling factors such as clinic hours, transportation requirements, weather, a minor's school and work commitments, and sometimes a single parent's family and work commitments. In many cases, the effective length of delay may reach a week or more.

District court finding 52, Hodgson Appendix 22a-23a. The court's finding regarding possible delays of a week or more appears to be based upon facts relating to the relative inaccessibility of abortion services in Minnesota. District court findings 22-26, Hodgson Appendix 14a-15a. It is not otherwise apparent from the record, however, how these logistical difficulties would cause the 43 hour notice requirement to result in delays of a week or more. Typically, when a pregnant minor telephones an abortion clinic to arrange an abortion, the operation, in the absence of unusual medical circumstances, is not scheduled to occur sooner than 48 or 72 hours hence. T. 156-59, A. 158-59 Opinion of the Circuit Court, Hodgson Appendix 97a. Accordingly, in such typical cases it does not appear from the record how the fulfillment of the 48 hour parental notice requirement delays the abortion operation at all.[9]

In any event, the record fails to establish a single instance in which any delay associated with the length of the parental notification requirement has resulted in medical complication. Public health data collected, maintained and published by the Minnesota Department of Health likewise fails to reveal any increase in medical complications among the population of

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[9] For example, the telephone training manual of Meadowbrook Clinic indicates that if a pregnant minor calls on a Monday and reveals that she wishes to comply with the statute by mailed parent notification, the notification is mailed on that same day and the abortion may be scheduled as soon as Thursday. *See* P. Exh. 70A, at p. 4.

minors undergoing abortions since August 1, 1981. A. 827-28, D. Exh. 25. Moreover, that data records no increase in the average gestational age of minors obtaining abortions in Minnesota or in the proportions of minors receiving second trimester abortions in Minnesota since August 1, 1981. A. 243, A. 826, A. 829, D. Exh. 35.

The district court further acknowledged that "[s]ome period of mandatory delay between the time of actual or constructive notification of the minor's parent and the abortion itself would reasonably effectuate the State's interest in protecting pregnant minors" and that "[a] waiting period may allow parents to aid, counsel, advise, and assist minors in determining whether to undergo an abortion or to provide the physician with information which may be relevant to the medical judgments involved." District court finding 73, Hodgson Appendix 32a. The district court also found, however, that:

> The interest effectuated by the State's 48 hour waiting period could be effectuated as completely by a shorter waiting period. Therefore, to the extent the waiting period exceeds that necessary to allow parents to consult with minors contemplating abortion, it fails to further the State's interest in protecting pregnant minors.

District court finding 74, Hodgson Appendix 32a. The district court does not otherwise explain the basis of this finding, and defendants are unaware of any evidence in the record to support it.

REASONS FOR GRANTING THE WRIT

I. The Federal Question is an Important One.

The State of Minnesota, in adopting Minn. Stat. § 144.343, Subd. 2-5, merely attempts to pursue a policy which, in virtually any other context, would be so plainly permissible as to need no discussion; that is, that the parents should know about and be able to have a role in traumatic crises and pivotal choices in the lives of their children.

As pointed out by the plaintiffs in their petition for certiorari, at least nine other states have statutes which require notice to parents of minors' abortions.[10] At least two of these other states have sought review by this Court of circuit court decisions which have imposed severe restrictions upon the authority to require that parents be even notified of their daughter's impending abortion.[11]

Few, if any, principles of our society are so central or long standing as the cardinal notion that the care, custody and nurture of children should reside presumptively in the parents. *See Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (state's interest in protecting children from harm is sufficient to sustain child labor laws despite basic parental rights to control of children); *Bellotti v. Baird*, 443 U.S. 622 (1979) (*Bellotti II*)

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[10] Hodgson Petition at 14-15. The petition also lists 14 states which have statutes requiring parental consent to minors' abortions.

[11] *Zbaraz v. Hartigan*, 584 F.Supp. 1452 (N.D. Ill. 1984), *vacated in part and remanded* 763 F.2d 1532 (7th Cir. 1985), *aff'd by an equally divided court*, —— U.S. ——, 108 S.Ct. 479 (1987); *Akron Center for Reproductive Health v. Rosen*, 633 F.Supp. 1123 (N.D. Ohio 1986), *aff'd* 854 F.2d 852 (6th Cir. 1988), *appeal filed sub. nom., Ohio v. Akron Center for Reproductive Health*, 57 U.S.L.W. 3378 (U.S. Nov. 28, 1988 (No. 88-805)).

(state may require parental consent to minors' abortions if certain conditions are met); *Parham v. J.R.*, 442 U.S. 584 (1979) (hearing not required when parents seek admittance of child to state mental health facility). Few, if any, rights are more cherished than the right of parents to raise and care for their own children. *See Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (statute forbidding the teaching of foreign languages invalid); *May v. Anderson*, 345 U.S. 528, 533 (1933) (court not having *in personam* jurisdiction over parent may not cut off her rights to the care, custody and management of children—rights which are "far more precious than property").

Thus, it is plain that the question of whether parents are entitled to know of their daughters' abortion decisions is of critical importance throughout the country.

II. The Court Has Not Ruled Upon the Scope of the Authority of States to Require Mere Parental Notice of Children's Abortion Plans.

Given the necessary recognition of these strong public purposes and parental rights, the Court has determined that states may promote parental involvement in circumstances where a pregnant minor child proposes to undergo an abortion. *See, e.g., Bellotti II*, 443 U.S. at 643. However, in view of what the Court has viewed as the "unique" and non-postponable nature of the abortion decision, the Court has held that statutes requiring parental consent could not grant a parent "an absolute and possibly arbitrary veto over the decision of the physician and his patient to terminate the patient's pregnancy." *See Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976). Therefore, the Court concluded that a state may not mandate parental consent to abortions unless some alternate procedure

is available whereby an arbitrary veto may be avoided. *Bellotti II*, 443 U.S. at 643-44.

While a majority of the *Bellotti II* Court concurred in the judgment striking down the Massachusetts statute, it is clear that a majority of the Court did not necessarily endorse, in principle, Justice Powell's suggestion that minors may need to be permitted to avoid even parental notice when employing a court bypass option. *See* 443 U.S. at 651-52 (Rehnquist, J., concurring). *Id.* at 656-57 (White, J., dissenting). As Justice Stevens also wrote in concurrence,

> By affording such a veto, the Massachusetts statute does far more than simply provide for notice to the parents. . . . *Neither Danforth nor this case determines the constitutionality of a statute which does no more than require notice to the parents, without affording them or any other third party an absolute veto.*

443 U.S. 654 n.1 (emphasis added).

In *H.L. v. Matheson*, 450 U.S. 398 (1981), the Court was faced with a Utah statute which required parental notice, but not parental consent, to abortions. The Court did not, however, declare the statute unconstitutional on its face due to failure to provide a formal notice-avoidance procedure. Instead the Court upheld the statute on its face and as applied to the plaintiff who was not found to have established that she was "mature or emancipated" and made no showing as to her relations with her parents with respect to abortions. *See H.L. v. Matheson*, 450 U.S. 398, 407 (1981). Thus while there exist a number of opinions by individual justices upon the question, there exists no direct holding by the Court concerning the

authority of a state to require that the parents of an unemancipated minor be notified prior to an abortion.[12]

III. The Court Should Establish the Proper Recognition of the Several Rights and Interests of Society, Parents and Minors by Upholding Minnesota's Notice Requirement.

A statute which only requires parental notice presents substantially different questions from those involved where parental consent is required. Providing merely for parental notice gives no one the legal power of veto over the abortion decision. Rather it merely permits an opportunity for parental care and involvement, not only in the abortion decision process itself, but also in addressing the related problems of youthful sexual activity and pregnancy. To deny notice, however, virtually assures that no such opportunity will exist in many cases.

As was observed by Justices Stewart and Powell concurring in *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 91 (1976), and reiterated by Chief Justice Burger in *H.L. v. Matheson*, 450 U.S. 398, 409-10 (1981):

> [The decision whether or not to bear a child] is a grave decision, and a girl of tender years, under emotional stress, may be ill-equipped to make it without mature advice and emotional support. It seems unlikely that she will obtain adequate counsel and support from the attending physician at an abortion clinic, where abortions for pregnant minors frequently take place.

[12] In *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983), the Court reiterated the *Bellotti II* standards for statutes requiring parental consent, but did not have occasion to address the parental notice aspect of the ordinance involved since the decision upholding that requirement had not been appealed. A footnote in *Akron* suggested that *Matheson, supra*, had held that requiring notice of a court proceeding to parents of a "mature minor" would be unconstitutional. *Akron, supra*, 462 U.S. at 441, n. 31. However, as pointed out by Justice O'Connor, joined by Justices White and Rehnquist, *Matheson* expressly did not decide that issue. *Id.* 462 U.S. at 469 n. 12.

Indeed, as indicated by the trial court, abortion providers rarely if ever decline to perform, without parental notice, an abortion on a minor they believe to be "immature."[13]

The entire tenor of the proposition that parents should be denied notice suggests that the state is obligated to adopt a predisposition favoring abortion which fails to recognize the observation in *Bellotti II* that:

> Yet, an abortion may not be the best choice for the minor. The circumstances in which this issue arises will vary widely. In a given case, alternatives to abortion, such as marriage to the father of the child, arranging for its adoption, or assuming the responsibilities of motherhood with the assured support of family, may be feasible and relevant to the minor's best interests.

443 U.S. at 642-43.

Furthermore, it is clear that a minor may be sufficiently "mature" to make the specific decision to abort but not sufficiently "mature" to face the abortion process and aftercare needs all alone, or to deal with all the underlying factors precipitating the need for abortion.

Closely related to the proper interest of the state in safeguarding the care and decision-making process of minors in crisis situations is the right of parents to raise their minor children and participate in the conduct of their lives. This right has been held to flow from the same constitutional source

[13] District court conclusions of law, Hodgson Appendix at 41a-42a.

as the rights associated with the abortion decision. *See, e.g., Roe v. Wade*, 410 U.S. 113, 153 (1973) (child rearing and education are fundamental personal rights "implicit in the concept of ordered liberty").

It may be correct to conclude that the balance between these rights should not be struck in favor of authorizing absolute parental veto of the abortion decision. However, the most basic and least burdensome provision which may be made for the protection of any right is entitlement to notice. To eliminate a general right to notice and to authorize, by dint of constitutional mandate, either the abortion provider or a judge to veto any parental right whatever to even know of this critical event in their child's life is, in essence, to eliminate totally any parental right in this area.

It is submitted that the proper balance to be struck is that neither "right" be accorded absolute veto over the other. Such a balanced accommodation among potentially competing "rights" can only be struck by providing parents, at very least, reasonable notice that the issue is pending.

CONCLUSION

This case presents the Court with an opportunity to address an extremely important question of constitutional law which has not been, but definitely should be, settled by this Court. The cross-petition should therefore be granted if the Court grants certiorari in *Hodgson v. State of Minnesota*, No. 88-1125.

Respectfully submitted,

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